

1 HONORABLE RICHARD A. JONES  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 3M COMPANY,

9 Plaintiff,

10 vs.

11 AIME LLC, MARK BACIAK, AND  
MICHAEL BINGHAM,

12 Defendants.  
13

Case No. 2:20-cv-01096-RAJ

**MOTION TO DISMISS DEFENDANTS'  
COUNTERCLAIMS**

**NOTE ON MOTION CALENDAR:  
December 18, 2020**

**ORAL ARGUMENT REQUESTED**

**CONFERENCE CERTIFICATION**

Counsel for 3M certifies that it discussed all claims at issue at length with counsel for Defendants by telephone on November 20, 2020, but was unable to reach an agreement that the counterclaims are deficient and should be withdrawn or repledaded.

**INTRODUCTION**

3M sued Defendants as part of a nationwide effort to combat the rampant fraud and profiteering that has accompanied the pandemic-driven spike in demand for medical respirators. The Providence hospital system—an existing 3M end-user—and its authorized 3M distributor reported that Defendants claimed access to *500 million* 3M N95 filtering facepiece respirators, or roughly 3M's entire pre-pandemic annual production. The report included documentary evidence that Defendants were using forged 3M documents, misrepresenting 3M's sales process, falsely claiming that 3M would be directly involved in the transaction, and demanding upfront payment of more than four times 3M's list price per respirator. When 3M approached Defendants, they

1 insisted that 3M was the fraudulent actor, and refused to provide any explanation for how they  
 2 were offering so many respirators, or why they were falsely claiming an affiliation with 3M  
 3 After confirming Defendants were defrauding consumers, 3M filed this action to protect the  
 4 public and 3M's good name and trademarks from the Defendants' scheme.

5 Rather than abandon their scheme, the Defendants doubled-down, offering a fabricated  
 6 narrative that 3M is somehow hiding 90% of its global production and selling it through irregular  
 7 channels to enrich corporate officers (without anyone but AIME noticing), in which AIME has  
 8 gone from non-existent to rivaling 3M's production capacity in mere months, and in which 3M's  
 9 request for an injunction restricting misuse of 3M's name and marks is an anticompetitive ploy  
 10 designed to shut down AIME. These allegations are fabrications designed to deflect from the  
 11 Defendants' transparent malfeasance, best evidenced by the fact that Baciak and Bingham  
 12 dissolved the AIME entity on the same day 3M filed this action.

13 Defendants assert seven counterclaims against 3M. None is legally sound or supported by  
 14 plausible factual allegations, and thus each fails to state a claim upon which relief can be granted.  
 15 3M therefore moves to dismiss the counterclaims under Rule 12(b)(6).

#### ARGUMENT AND AUTHORITY

16 Under, Fed. R. Civ. P. 12(b)(6), a claim is subject to dismissal when it lacks "a cognizable  
 17 legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica  
 18 Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The Court should assess the counterclaims "in  
 19 the light most favorable to the plaintiff" to "determine whether it alleges enough facts 'to state a  
 20 claim to relief that is plausible on its face.'" *Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d  
 21 1005, 1007 (9th Cir. 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
 22 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
 23 draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.  
 24 Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff's allegations "must plausibly suggest an entitlement  
 25 to relief, such that it is not unfair to require the opposing party to be subjected to the expense of  
 26

1 discovery and continued litigation.” *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751  
 2 F.3d 990, 996 (9th Cir. 2014) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

3 **I. Malicious Prosecution**

4 Defendants’ first counterclaim is malicious prosecution. *See* Countercl. ¶¶ 103-07.  
 5 “Actions for malicious prosecution are not favored in the law.” *Brin v. Stutzman*, 89 Wn. App.  
 6 809, 818, 951 P.2d 291, 297 (1998). To state this counterclaim, Defendants must plead that (1)  
 7 3M instituted this action, (2) 3M did not have probable cause, (3) 3M initiated the action with  
 8 malice; and (4) an injury resulting from the action. *Id.*; RCW 4.24.350. They must allege facts  
 9 sufficient to show that 3M’s action is wholly meritless, not just partially untrue. *Brin* at 819-820.  
 10 Defendants here have failed to state a claim for malicious prosecution, because they have not  
 11 stated sufficient facts to support an inference as to the second, third, or fourth elements.

12 **A. Defendants’ allegations do not support an inference of malice.**

13 Defendants contend two facts support an inference of malice: (1) that 3M did not send a  
 14 cease-and-desist letter before filing this action, and (2) that 3M used a “cookie-cutter” complaint.  
 15 *See* Countercls. ¶¶ 106-07. No reasonable person could infer malice from these allegations.

16 The malice element of this tort requires that the claim ““was undertaken from improper or  
 17 wrongful motives or in reckless disregard of the rights of the plaintiff.”” *Bender v. City of*  
 18 *Seattle*, 99 Wn.2d 582, 594, 664 P.2d 492, 501 (1983) (quoting *Peasley v. Puget Sound Tug &*  
 19 *Barge Co.*, 13 Wn.2d 485, 502, 125 P.2d 681, 689 (1942)) (emphasis omitted). Declining to send  
 20 a formal cease-and-desist letter establishes neither “wrongful motives” nor “reckless disregard”  
 21 for Defendants rights; there is no obligation to send such letters, and Defendants concede that  
 22 3M reached out to them by telephone. Countercl. ¶ 61. Nor could Defendants’ opinion that the  
 23 complaint was not sufficiently “tailored” to their wrongdoing imply malice; Defendants offer  
 24 nothing in support of that assertion but their *ipse dixit*, and ignore the manifold specific  
 25 allegations about their misconduct. *See, e.g.*, Compl. ¶¶ 1-8, 20-23, 53-73.

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1           **B. Defendants' probable cause argument ignores the nature of 3M's claim.**

2           Defendants contend that 3M's trademark claims lacks probable cause, arguing that the  
 3 first-sale doctrine allowed Defendants to identify the respirators they were selling with 3M's  
 4 marks. *See* Countercl. ¶ 105. That argument fails because that is not what 3M alleges. Instead,  
 5 3M claims that Defendants implied a false affiliation with 3M by, *inter alia*, forging documents  
 6 purporting to be from 3M and representing that orders from AIME could be tracked on 3M's  
 7 website. *See* Compl. ¶¶ 5, 63-70. Federal courts have repeatedly endorsed the validity of 3M's  
 8 theory. *See 3M Co. v. Performance Supply, LLC*, 458 F. Supp. 3d 181, 196 (S.D.N.Y. 2020); *see*  
 9 also, e.g., *3M Co. v. Rx2Live, LLC*, 120CV0523NONESAB, 2020 WL 3579828 (E.D. Cal. Apr.  
 10 30, 2020). Because 3M's theory is valid, the first sale<sup>1</sup> doctrine does not defeat probable cause.

11           Moreover, a "reasonable belief" in the merits of the action is a complete defense. *See*  
 12 *Brin*, 89 Wn. App. at 822-23. Several federal courts have recognized the merits of 3M claims on  
 13 similar facts, precluding any inference that 3M could not have reasonably expected success.

14           **C. Defendants' own allegations support probable cause.**

15           Defendants admit that Baciak formed AIME shortly after the WHO declared COVID-19  
 16 a pandemic and the first United States case was discovered in Washington state. *See* Compl. ¶  
 17 53; Ans. ¶ 50. Defendants admit they are not authorized distributors of 3M products. *See* Compl.  
 18 ¶ 57; Ans. ¶ 57. Defendants admit that 3M's annual production of N95 respirators was 1.1 billion  
 19 when this lawsuit began. *See* Compl. ¶¶ 43-44; Ans. ¶¶ 43-44.

20           Defendants nevertheless allege that an attorney claiming to represent a company called  
 21 "First Key" approached AIME, claiming to have "access to 500 million 3M 1860 respirators."  
 22 Countercl. ¶ 60. Defendants allege that the unnamed attorney claimed that "First Key" was

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 24           <sup>1</sup> In any event, the first sale doctrine does not apply because Defendants did not (and could not) have purchased  
 25 original or genuine 3M model 1860 N95 respirators based on the sheer alleged volume that Defendants claimed they  
 26 could access. *See* Compl. ¶¶ 43-44; Ans. ¶¶ 43-44; Countercls. ¶ 60. Defendants admit they are not authorized 3M  
 product distributors. Compl. ¶ 57; Ans. ¶ 57; *see Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc.*, 603 F.3d 1133,  
 1135-39 (9th Cir. 2010) (holding that "first sale" doctrine does not provide a defense where non-genuine/counterfeit  
 accused products) (surveying cases).

1 negotiating a contract with 3M. *See id.* Defendants do not claim that they sought to verify that  
 2 First Key was an authorized distributor, or that they even believed it was. *See id.* Defendants  
 3 allege that they told Providence they had access to 500 million 3M respirators, while obfuscating  
 4 the details of the transaction *See id.* at ¶ 61. Defendants allege that Providence either had 3M  
 5 listening in on the call or relayed the details of the call to 3M. *See id.* Defendants allege that 3M  
 6 contacted AIME, that AIME represented their supplier was “First Key,” and that 3M could not  
 7 find “First Key” in 3M’s systems. *See id.*

8 These, then, are the undisputed facts: Baciack formed AIME in February 2020, at the  
 9 dawn of the COVID 19 pandemic in the United States. A few short weeks later, in March 2020,  
 10 AIME represented to Providence that it had access to 500 million 3M N95 respirators—nearly  
 11 half of 3M’s then-current annual production for all models of N95 respirators (and  
 12 approximately equal to 3M’s pre-pandemic global production). Providence brought this to 3M’s  
 13 attention. When 3M asked AIME where it was getting these respirators, AIME provided the  
 14 name of a company not on 3M’s list of approved suppliers.

15 Having heard this wild and extremely implausible tale from AIME, 3M acted reasonably  
 16 by taking action to protect the public against fraud and to protect 3M’s name and reputation. A  
 17 newly-created company was claiming to have a year’s worth of 3M’s N95 production, and was  
 18 lying to 3M’s end-users about the origin of the goods and 3M’s involvement with AIME.

19       **D.     *Defendants’ allegations do not support an inference of damages.***

20 Defendants make no factual allegations of damages stemming from this action. *See*  
 21 Countercl. ¶¶ 103-108. To the extent Defendants mean to rely upon the allegation that they have  
 22 incurred attorneys’ fees, attorneys’ fees are not “damages” for a malicious prosecution claim  
 23 under Washington law. *Fenner v. Lindsay*, 28 Wn. App. 626, 630, 625 P.2d 180, 182 (1981).<sup>2</sup>

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<sup>2</sup> Nor could Defendants rely on punitive damages to satisfy this element. The tort of malicious prosecution does not allow for punitive damages under Washington law. *See Peterson v. Littlejohn*, 56 Wn. App. 1, 13, 781 P2d 1329, 1336 (1989) (while § 1983 claim could support punitive damages, tort of malicious prosecution could not).

1       **II. Abuse of Process**

2           Defendants' second counterclaim is abuse of process. *See Countercl.* ¶¶ 109-110. Under  
 3 Washington law, the elements of abuse of process are ““(1) the existence of an ulterior purpose  
 4 to accomplish an object not within the proper scope of the process and (2) an act in the use of  
 5 legal process not proper in the regular prosecution of the proceedings.”” *See Batten v. Abrams*,  
 6 28 Wn. App. 737, 745, 626 P.2d 984, 988 (1981) (quoting *Fite v. Lee*, 11 Wn. App. 21, 27, 521  
 7 P.2d 964 (1974)). ““The mere institution of a legal proceeding even with a malicious motive does  
 8 not constitute an abuse of process.”” *See id.* (quoting *Fite* at 27). ““Thus, there must be an act after  
 9 filing suit using legal process empowered by that suit to accomplish an end not within the  
 10 purview of the suit.”” *Id.* at 748.

11           Here, Defendants do not allege that 3M has used any process empowered by the suit for  
 12 an improper end. Instead, they complain about the fact of the action itself. That is not actionable  
 13 as abuse of process under Washington law. The claim therefore fails as a matter of law.

14       **III. Antitrust**

15           Defendants' bring their third claim under Sections 1 and 2 of the Sherman Act, alleging  
 16 that 3M is using this suit to stifle competition.. *See Countercl.* ¶¶ 111-20. The claim has no  
 17 factual or legal basis. All 3M seeks to do is ensure that Defendants not use 3M's name to  
 18 misrepresent that they have a relationship with 3M or that 3M is involved in their sales.

19           The antitrust claim fails for several reasons. First, 3M has immunity for this lawsuit under  
 20 the Petition Clause of the First Amendment. Second, Defendants have not identified the relevant  
 21 market. Third, Defendants have not pleaded concerted action or market impact. Fourth,  
 22 Defendants have not pleaded monopolization or attempted monopolization.

23           **A. The First Amendment bars antitrust claims based on litigation activity.**

24           “Those who petition government for redress are generally immune from antitrust  
 25 liability.” *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56, 113  
 26 S. Ct. 1920, 1926 (1993). This “*Noerr* immunity” extends to litigation, even if the plaintiff's sole

1 purpose is to “destroy their competitors.” *Id.* at 57 (alteration omitted) (quoting *E. R. R.*  
 2 *Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 81 S. Ct. 523, 530 (1961)).<sup>3</sup>

3       1.     The only exception to this rule is when a lawsuit is a “sham.”

4           A narrow exception to this doctrine exists, but does not apply here. The Supreme Court  
 5 has held that *Noerr* immunity does not apply to a “sham” lawsuit that “bars competitors from  
 6 meaningful access to adjudicatory tribunals and so usurps the decisionmaking process.” *Profl*  
 7 *Real Estate*, 508 U.S. at 58 (internal alterations omitted) (quoting *California Motor Transp. Co.*  
 8 *v. Trucking Unlimited*, 404 U.S. 508, 512, 92 S. Ct. 609, 612 (1972)).

9       2.     A party alleging a sham must clear a high bar.

10           To prevent chilling First Amendment activities, the normal Rule 12(b)(6) standard does  
 11 not apply when evaluating *Noerr* immunity. A plaintiff asserting an antitrust claim based on  
 12 litigation activities “has the burden to state factual allegations that show the defendant’s conduct  
 13 falls outside the protection of *Noerr-Pennington*.” *Evans Hotels, LLC v. Unite Here Local 30*,  
 14 433 F. Supp. 3d 1130, 1144 (S.D. Cal. 2020). “In order not to chill legitimate lobbying activities,  
 15 it is important that a plaintiff’s complaint contain specific allegations demonstrating that the  
 16 *Noerr-Pennington* protections do not apply.” *Boone v. Redevelopment Agency of City of San*  
 17 *Jose*, 841 F.2d 886, 894 (9th Cir. 1988). “Courts may properly be more critical in reviewing  
 18 complaints which invoke the sham exception to the *Noerr-Pennington* doctrine since the conduct  
 19 is presumptively protected by the first amendment, involving here the right of access to the  
 20 court.” *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983).

21       B.     ***3M’s lawsuit is clearly not a sham.***

22           The test used to assess whether litigation is a sham varies depending on whether or not  
 23 the claimant alleges a series of sham proceedings. *POSCO*, 31 F.3d at 810-11. One standard  
 24 applies to an isolated action, and another to a series of actions. *See id.* Defendants do not state

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25       26       <sup>3</sup> Even on the face of the counterclaims, this is clearly not 3M’s motive. 3M seeks an injunction only against the use  
 27 of its marks by an unauthorized reseller. Resellers of respirators 3M has already sold into the downstream  
 market are not “competing” with 3M in the upstream manufacturing level.

1 which standard they assert applies. Under either standard, however, this action clearly is not a  
 2 “sham.” *Noerr* immunity thus precludes Defendants’ antitrust claim.

3       1.     *3M’s claim is not a sham under the isolated-claim standard.*

4           An isolated lawsuit undergoes a two-step analysis. “First, the suit must be ‘objectively  
 5 baseless in the sense that no reasonable litigant could realistically expect success on the merits’;  
 6 second, the baseless lawsuit must conceal “‘an attempt to interfere directly with the business  
 7 relationships of a competitor.’”” *POSCO*, 31 F.3d at 810 (quoting *Prof'l Real Estate*, 508 U.S. at  
 8 60-61). “The two parts of the test operate in succession: Only if the suit is found to be  
 9 objectively baseless does the court proceed to examine the litigant’s subjective intent.” *Id.* at 810.

10          a.     *3M’s claim is not objectively baseless.*

11           “If an objective litigant could conclude that the suit is reasonably calculated to elicit a  
 12 favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the  
 13 sham exception must fail.” *Prof'l Real Estate*, 508 U.S. at 60. “The existence of probable cause  
 14 to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham  
 15 litigation.” *Id.* at 62. “Probable cause to institute civil proceedings requires no more than a  
 16 ‘reasonable belief that there is a chance that a claim may be held valid upon adjudication.’” *Id.* at  
 17 62-63 (internal alterations omitted). “Where . . . there is no dispute over the predicate facts of the  
 18 underlying legal proceeding, a court may decide probable cause as a matter of law.” *Id.* at 64.

19           Defendant, therefore, bears the burden of pleading sufficient facts to overcome the *Noerr*  
 20 presumption. “Conclusory allegations are not sufficient to strip a defendant’s activities of *Noerr-*  
*Pennington* protection.” *Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991).  
 21 Nor are conclusory allegations sufficient to state a claim under *Bell Atlantic Corp. v. Twombly*,  
 22 550 U.S. 544, 570 (2007).

23           Here, Defendants’ pleading does not establish an absence of probable cause under the  
 24 heightened standard applied when evaluating challenges to *Noerr* immunity (nor, for that matter,  
 25 any other standard). Even accepting the facts as pleaded (while ignoring—as courts must—

1 conclusory allegations and conclusions of law), there can be no doubt that 3M objectively had  
 2 probable cause to initiate this suit. *See Part I.C, supra.*

3 On the undisputed facts, 3M had objective probable cause to bring an action against the  
 4 Defendants. Defendants told a 3M customer that they controlled nearly half of 3M's pandemic-  
 5 level production of N95 respirators, but could not explain the origin of the goods they were  
 6 trying to sell. When 3M contacted Defendants, they claimed that 3M was unaware of its own  
 7 respirator production and selling practices. When it filed this action, 3M had already obtained a  
 8 preliminary injunction on a similar claim. *3M Co. v. Performance Supply, LLC*, 458 F. Supp. 3d  
 9 181, 196 (S.D.N.Y. 2020). 3M's claim was objectively reasonable, and *Noerr* immunity applies.

10 b. 3M's claim does not interfere with a competitor's business.

11 In the single-claim analysis, the second question is whether the action conceals “an  
 12 attempt to interfere directly with the business relationships of a competitor.”” *POSCO*, 31 F.3d  
 13 at 81. As a threshold matter, the plaintiff and the defendant *must actually be competitors*. *See*  
 14 *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 280 F. Supp. 3d 691, 715–16 (D. Md.  
 15 2017), *aff'd*, 937 F.3d 1359 (Fed. Cir. 2019) (patent assertion entity could not sham exception to  
 16 *Noerr* immunity for bank's lawsuit, as the bank and the patent assertion entity were not  
 17 competitors); *Evans Hotels*, 433 F. Supp. 3d at 1151 (test not satisfied because “hotel operators  
 18 and developers and labor unions are not competitors.”).

19 Here, Defendants allege no facts supporting an inference that AIME is a competitor to  
 20 3M. Defendants make a conclusory allegation to that effect, *see* Countercl. ¶ 115, but that is not  
 21 sufficient. *Oregon Nat.*, 944 F.2d 533; *Twombly*, 550 U.S. at 570. Under either the Rule 12(b)(6)  
 22 standard or the heightened standard for allegations of sham litigation, Defendants must plead  
 23 some facts supporting an inference that the parties are competitors. *See Oregon Nat.* at 533. All  
 24 Defendants allege is the unsupported assertion that they expect to match 3M's global pre-  
 25 pandemic N95 respirator production out of a “small facility” in the next few months. *See*  
 26 Countercl. ¶¶ 17, 33. Defendants do not claim that they have manufactured or sold even one

1 solitary respirator (as opposed to a non-respirator mask). Because Defendants plead no facts  
 2 supporting an inference that they are actually a competitor to 3M, they have failed to plead a  
 3 necessary element of the sham exception to *Noerr* immunity.

4 Finally, even if the Court accepted that AIME is a “competitor” to 3M, Defendants have  
 5 not pleaded sufficient facts to support an inference that 3M’s only objective here is to interfere in  
 6 AIME’s business. They assert such a *conclusion*—see Countercl. ¶¶ 99-100, 118-119—but they  
 7 allege no *facts* supporting that conclusion. Indeed, they do not even take a position as to what  
 8 possible anticompetitive ends 3M seeks to accomplish, nor can they. *See id.* at 119. Nothing in  
 9 3M’s action would prevent AIME from manufacturing and selling respirators, provided they do  
 10 not try to defraud their customers into thinking that 3M is involved. Indeed, Defendants do not  
 11 actually allege that this lawsuit has actually interfered with their business in any way. They do  
 12 admit, however, that they claimed to have access to half of 3M’s annual pandemic respirator  
 13 production despite having no relationship with 3M or any authorized 3M distributor. Defendants,  
 14 therefore, have not established a reasonable inference that 3M’s only objective here is  
 15 interference.

16           2.       *3M’s successful campaign is not a sham for the serial litigation standard.*

17       To determine whether a series of lawsuits is a sham, the relevant question is whether “the  
 18 legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a  
 19 pattern or practice of successive filings undertaken essentially for purposes of harassment[.]”  
 20 *POSCO*, 31 F.3d at 811. This approach requires “some indication as to the merits of these  
 21 underlying actions.” *Wonderful Real Estate Dev. LLC v. Laborers Int’l Union of N. Am. Local*  
 22 220, 119CV00416LJOSKO, 2020 WL 91998, at \*10 (E.D. Cal. Jan. 8, 2020). “Without any  
 23 information regarding the merits of the lawsuits,” a court cannot evaluate their merits.

24       Here, Defendants allege no facts about the merits of the other lawsuits. Defendants  
 25 simply allege that 3M has filed 18 other lawsuits in response to 4,000 reports of fraud and  
 26

1 profiteering. Countercl. ¶ 94.<sup>4</sup> This does not establish a pattern of harassment that could  
 2 abrogate 3M’s First Amendment right to seek redress in court. Indeed, even Defendants concede  
 3 that this pattern suggests that 3M is suing only the worst fraudsters and profiteers. *See id.*

4 Furthermore, the *POSCO* court recognized that a pattern of success in serial litigation  
 5 conclusively repels any attack on *Noerr* immunity. *POSCO*, 31 F.3d at 811 (“Given that the  
 6 plaintiff has the burden in litigation, a batting average exceeding .500 cannot support [plaintiff]’s  
 7 theory.”). Here, 3M has brought 27 lawsuits to date, and has resolved more than half of those  
 8 cases with either orders or agreements to stop the misconduct. Such a pattern of success  
 9 precludes any allegation that these lawsuits are baseless. Under *POSCO*, then, 3M’s pattern of  
 10 litigation is reasonable and protected by *Noerr* immunity and the First Amendment.

11       C. ***Defendants have not adequately pleaded an antitrust claim.***

12       “Of course, even a plaintiff who defeats the defendant’s claim to *Noerr* immunity by  
 13 demonstrating both the objective and the subjective components of a sham must still prove a  
 14 substantive antitrust violation.” *Prof'l Real Estate*, 508 U.S. at 60. “Proof of a sham merely  
 15 deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish  
 16 all other elements of his claim.” *Id.* Here, Defendants have failed to plead a valid antitrust claim  
 17 in the most fundamental sense. Even without *Noerr* immunity, then, the Court should dismiss the  
 18 antitrust counterclaim.

19       1. ***Defendants have not adequately pleaded a market or market power.***

20       “In order to state a valid claim under the Sherman Act, a plaintiff must allege that the  
 21 defendant has market power within a ‘relevant market.’ That is, the plaintiff must allege both  
 22 that a ‘relevant market’ exists and that the defendant has power within that market.” *Newcal*  
 23 *Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). “The ‘relevant market’ and  
 24 ‘market power’ requirements apply identically under the two different sections of the Act.” *Id.* at  
 25 n.3. Because Defendants do not identify a relevant product market, a relevant geographic market,

26 <sup>4</sup> The present figures are 24 lawsuits filed based on more than 8,900 reports.

1 or market power, their antitrust claims fail.

2                   a.        Defendants' market identification is insufficient.

3                 “[A]complaint may be dismissed under Rule 12(b)(6) if the complaint's ‘relevant market’  
4 definition is facially unsustainable.” *Id.* at 1045. The relevant market must encompass “the  
5 product at issue as well as all economic substitutes for the product.” *Id.* What “economic  
6 substitutes” are at issue is governed by “‘the reasonable interchangeability of use or the cross-  
7 elasticity of demand between the product itself and substitutes for it.’” *Id.* (quoting *Brown Shoe*  
8 *v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502 (1962). “The failure to allege a product  
9 market consisting of reasonably interchangeable goods renders [a complaint] ‘facially  
10 unsustainable’ and appropriate for dismissal.” *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*,  
11 433 Fed. Appx. 598, 599 (9th Cir. 2011) (mem. op.) (quoting *Newcal*, 513 F.3d at 1045); accord  
12 *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997).

13                 Defendants have failed to properly define a relevant market. They have not identified any  
14 economic substitutes for N95 respirators, which may include such as N99, N100, R95, R99,  
15 R100, P95, P99, or P100 filtering facepiece respirators; non-respirator facemasks; elastomeric  
16 half-face or full-face respirators; or HEPA powered air-purifying respirators.<sup>5</sup>

17                 Defendants' failure to address any economic substitutes for N95 filtering facepiece  
18 respirators is fatal to their claim, and merits dismissal. *See Colonial Med. Grp., Inc. v. Catholic*  
19 *Health Care W.*, 444 Fed. Appx. 937, 938 (9th Cir. 2011) (district court properly dismissed  
20 Sherman Act claim where complaint did not address economic substitutes).

21                   b.        Defendants do not allege market power.

22                 “A failure to allege power in the relevant market is a sufficient ground to dismiss an  
23 antitrust complaint.” *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 972

24                 <sup>5</sup> The Court should take judicial notice of background information about alternatives to N95 respirators. *See, e.g.*,  
25 National Institute for Occupational Safety and Health, *Respirator Trusted-Source Information* (Jan. 29, 2020),  
26 [https://www.cdc.gov/niosh/nptl/topics/respirators/disp\\_part/respresource1quest3.html](https://www.cdc.gov/niosh/nptl/topics/respirators/disp_part/respresource1quest3.html) (discussing alternatives to N95  
respirators); Centers for Disease Control, *Coronavirus Disease 2019 (COVID-19): N95 and Other Respirators*  
(Sept. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/n95-other-respirators.html> (same).

1 (9th Cir. 2008). Simply alleging that a defendant has market power is not sufficient—the plaintiff  
 2 must allege factual information about the defendant’s position in the market. *See id.*

3 “A firm has market power when, ‘by restricting its own output, it can restrict marketwide  
 4 output and, hence, increase marketwide prices.’” *Hip Hop Beverage Corp. v. Monster Energy*  
 5 *Co.*, 733 Fed. Appx. 380, 381 (9th Cir. 2018). “To allege market power circumstantially, the  
 6 plaintiff must: ‘(1) define the relevant market, (2) show that the defendant owns a dominant  
 7 share of that market, and (3) show that there are significant barriers to entry and show that  
 8 existing competitors lack the capacity to increase their output in the short run.’” *See id.* (quoting  
 9 *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)).

10 Defendants here have not pleaded any such facts. As discussed above, Defendants have  
 11 not adequately defined any market. Aside from the conclusory allegation that 3M has a “quasi-  
 12 monopoly,” Defendants have pleaded no *facts* suggesting that 3M has a dominant market share.  
 13 Nor have Defendants pleaded that there are high barriers to entering whatever market is at issue.  
 14 To the contrary, Defendants insist that new market entrants like themselves need less than one  
 15 year to build the capacity to manufacture *one billion* respirators annually. *See* Countercl. ¶ 33.  
 16 Moreover, Defendants concede that the *secondary market*, not 3M, is driving prices for N95  
 17 respirators. *Id.* at ¶ 1 (“[T]he demand for PPE has led to a natural and perfectly normal spike in  
 18 market prices.”). Because Defendants have failed to allege market power, they have failed to  
 19 state a claim.

20       2.     Defendants have not pleaded a Section 1 claim.

21 A Section 1 claim requires “(1) an agreement or conspiracy among two or more persons  
 22 or distinct business entities; (2) by which the persons or entities intend to harm or restrain  
 23 competition; and (3) which actually injures competition.” *Les Shockley Racing, Inc. v. Nat’l Hot*  
*Rod Ass’n*, 884 F.2d 504, 507 (9th Cir. 1989) (quoting *Oltz v. St. Peter’s Community Hosp.*, 861  
 24 F.2d 1440, 1445 (9th Cir. 1988)). The plaintiff “must, at a minimum, sketch the outline of the  
 25 antitrust violation with allegations of supporting factual detail.” *Id.* at 508.  
 26

1                   a.     Defendants allege no concerted action.

2                   A Section 1 claimant must allege concerted action. “The conduct of a single firm is  
 3 governed by § 2 alone . . . .” *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767, 104 S.  
 4 Ct. 2731, 2739, 81 L. Ed. 2d 628 (1984). “It is not enough that a single firm appears to ‘restrain  
 5 trade’ unreasonably . . . .” *Id.* Section 1 claims, therefore, require concerted action “between  
 6 separate entities.” *Id.* (emphasis in original). Concerted actions of the officers or employees of  
 7 an entity do not qualify. *Id.* at 769.

8                   Here, Defendants allege no facts at all suggesting that 3M coordinated or conspired with  
 9 anyone outside the company in bringing its claims. *See Countercl. ¶¶ 111-20.* While they make a  
 10 passing conclusory allegation to that effect elsewhere in their Counterclaims, *see id.* at ¶ 3, the  
 11 Counterclaims contain no factual allegations supporting that inference. Because Defendants  
 12 allege no concerted action, their Section 1 claim fails as a matter of law.

13                   b.     Defendants allege no injury to competition.

14                   A Section 1 claimant must make factual allegations establishing an injury to competition.  
 15 *Les Shockley Racing*, 884 F.2d at 507-08. Those factual allegations must ordinarily “include  
 16 proof of the relevant geographic and product markets and demonstration of the restraint’s  
 17 anticompetitive effects within those markets.” *Id.* at 508. Alternatively, a plaintiff may offer  
 18 “proof of actual detrimental competitive effects such as output decreases or price increases. *Id.* If  
 19 a plaintiff fails “to allege any actual detrimental competitive effects from the challenged  
 20 restraint, they [must] allege injury to competition within a framework of market analysis.” *Id.*

21                   Here, Defendants allege no “detrimental competitive effects” from 3M’s lawsuit at all,  
 22 nor could they. *See Countercl. ¶¶ 111-20.* While Defendants allege a *possibility* of harm to *their*  
 23 *speculative future business*, that does not suffice. *See Les Shockley Racing* at 508. “Although  
 24 proof of [Defendants]’ allegations would establish harm to their business interests, such proof  
 25 would not, standing alone, show injury to competition in the market as a whole.” *Id.* “Only when  
 26 the restraining force of an agreement or other arrangement affecting trade becomes unreasonably

1 disruptive of market functions such as price setting, resource allocation, market entry, or output  
 2 designation is a violation of the Sherman Act threatened.” *Id.*

3 For this reason, the Ninth Circuit holds “that section one claimants must plead and prove  
 4 a reduction of competition in the market in general and not mere injury to their own positions as  
 5 competitors in the market.” *Id.* Because Defendants’ counterclaims are “disturbingly silent about  
 6 the effect of their removal” from the relevant (and undefined) market, *see Countercl. ¶¶ 111-20,*  
 7 they have “failed to state a claim under Sherman Act § 1 that would justify any measure of  
 8 relief.” *See Les Shockley Racing* at 509. The Court should dismiss the Section 1 claim.

9       3.     Defendants have not pleaded a Section 2 monopoly claim.

10      A Section 2 monopoly claim requires “(1) the possession of monopoly power in the  
 11 relevant market and (2) the willful acquisition or maintenance of that power as distinguished  
 12 from growth or development as a consequence of a superior product, business acumen, or  
 13 historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S. Ct. 1698, 1704  
 14 (1966). “Monopoly power is the power to control prices or exclude competition.” *L.A. Land Co.*  
 15 *v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) (quoting *United States v. E. I. Du Pont de*  
 16 *Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 1005 (1956)).

17      As discussed above, Defendants make no factual allegations supporting an inference that  
 18 3M has power in any relevant market. *See Part III.C.1.b, supra.* This is fatal to Defendant’s  
 19 monopolization claim. Furthermore, and also discussed above, there is nothing wrongful or  
 20 exclusionary about 3M’s lawsuit. *See Part III.B, supra.* There is, therefore, no Section 2 claim  
 21 for monopolization on the face of the Complaint.

22       4.     Defendants have not pleaded a Section 2 attempted monopolization claim.

23      A plaintiff bringing a Section 2 claim for attempted monopolization must prove that “(1)  
 24 the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to  
 25 monopolize and (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports,*  
 26 *Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 890 (1993). To prove a dangerous

1 probability of success, it is “necessary to consider the relevant market and the defendant’s ability  
 2 to lessen or destroy competition in that market.” *Id.*

3 Here, Defendants’ failure to identify any market or describe factually 3M’s power in that  
 4 market precludes a Section 2 claim for attempted monopolization. Without factual allegations  
 5 about the market and 3M’s place in it, the Court cannot evaluate any whether 3M has a  
 6 probability of achieving monopoly power. And without any grounds for finding 3M’s litigation  
 7 objectively baseless, the Court cannot infer that 3M has engaged in any “predatory or  
 8 anticompetitive conduct.” And the one area where they have pleaded facts—their expectation to  
 9 develop capacity in under one year to produce 1 billion masks annually—on its face concedes  
 10 that market entry is capable of defeating any theoretical attempt at monopoly. There is, therefore,  
 11 no claim for attempted monopolization.

#### 12 **IV. Consumer Protection Act**

13 Defendants’ fifth counterclaim is for an alleged violation of Washington’s Consumer  
 14 Protection Act (CPA). *See* Countercl. ¶¶ 121-25. The CPA, like the Sherman Act, bans  
 15 monopolization and anticompetitive agreements. *See* RCW 19.86.030-040. It also prohibits  
 16 “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any  
 17 trade or commerce . . . .” *See* RCW 19.86.020. Defendants allege that 3M’s “unfair or deceptive  
 18 act or practice” was “monopolizing, attempting to monopolize or combining or conspiring with  
 19 any other person or persons to monopolize any part of trade or commerce, to wit, the market for  
 20 respirators and masks during the coronavirus pandemic.” Countercl. ¶ 122.

21 Defendants cannot state a CPA claim here, for several reasons. First, *Noerr* immunity  
 22 applies to this claim. Second, courts interpret monopolization or attempted monopolization  
 23 claims under the CPA in the same manner as under the Sherman Act. Third, Defendants have not  
 24 adequately pleaded an effect on the public interest.

##### 25 **A. Noerr immunity precludes the CPA claim.**

26 *Noerr* immunity applies to CPA claims. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931

1 (9th Cir. 2006) (“[T]he Noerr–Pennington doctrine stands for a generic rule of statutory  
 2 construction, applicable to any statutory interpretation that could implicate the rights protected  
 3 by the Petition Clause.”); *see also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54-56, 738 P.2d  
 4 665, 677 (1987) (applying *Noerr* to CPA antitrust claim). For the reasons discussed above, the  
 5 First Amendment therefore precludes the CPA claim.

6       **B. Defendants have shown no harm to the public interest.**

7       A CPA claim requires harm to the public interest. *Panag v. Farmers Ins. Co. of*  
 8 *Washington*, 166 Wash.2d 27, 37, 204 P.3d 885 (2009). Defendants provide only a conclusory  
 9 allegation that “3M’s unfair and deceptive acts impact the public interest.” Countercl. ¶ 124. The  
 10 Complaint, however, includes no factual allegations plausibly supporting this conclusion. In  
 11 reality, 3M’s claims which were asserted to prevent fraud, are in the public interest. *See*  
 12 *Panyanouvong v. Aphay*, No. 2:14-CV-00275 RSM, 2014 WL 2986507, at \*6 (W.D. Wash. July  
 13 1, 2014). The CPA claim therefore fails.

14       **C. Defendants CPA claim fails for the same reasons as the Sherman Act claims.**

15       When evaluating claims under RCW 19.86.030 and .040, this Court looks to “the  
 16 decisions involving comparable federal statutes, like the Sherman Act.” *Top Notch Sols., Inc. v.*  
*Crouse & Associates Ins. Brokers, Inc.*, C17-827 TSZ, 2017 WL 5158525, at \*4 (W.D. Wash.  
 17 Nov. 7, 2017). Defendants’ CPA antitrust claim therefore fails for the same reasons as their  
 18 Section 1 and 2 Sherman Act claims. *See id.*; *accord MiniFrame Ltd. v. Microsoft Corp.*, 551  
 19 Fed. Appx. 1, 3 (2d Cir. 2013).

21       **V. Tortious Interference with Prospective Economic Advantage**

22       Defendants’ fifth counterclaim is for interference with prospective economic advantage.  
 23 *See* Countercl. ¶¶ 126-31. That claim has five elements: “(1) the existence of a valid contractual  
 24 relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3)  
 25 an intentional interference inducing or causing a breach or termination of the relationship or  
 26 expectancy; (4) that defendants interfered for an improper purpose or used improper means; and

1 (5) resultant damage.” *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 351,  
 2 144 P.3d 276, 280 (2006). This claim belongs to AIME alone; Baciack and Bingham cannot state  
 3 a claim for interference with the entity’s opportunities. *See Rosenthal v. R. W. Smith Co.*, 260 F.  
 4 Supp. 3d 588, 597 (W.D. Va. 2017) (no tortious interference claim available to owner of  
 5 business with an expectancy); *see also Semida v. Rice*, 863 F.2d 1156, 1161 (4th Cir. 1988)  
 6 (same). As to AIME, Defendants have not pleaded facts supporting any of the elements.

7       **A. Defendants have not pleaded a business expectancy.**

8       “Washington courts require a plaintiff to show only that its ‘future business opportunities  
 9 are a reasonable expectation and not merely wishful thinking.’” *Greensun Grp., LLC v. City of  
 10 Bellevue*, 7 Wn. App. 2d 754, 769, 436 P.3d 397, 405 (quoting *Life Designs Ranch, Inc. v.  
 11 Sommer*, 191 Wash. App. 320, 337, 364 P.3d 129 (2015)). Defendants, however, have alleged no  
 12 facts supporting an inference that their prospective sales were more than mere fantasy.

13       While Defendants allege that they were in negotiations with several governments for the  
 14 sale of respirators—*see Countercl. ¶¶ 127*—Defendants do not plead that they possessed any  
 15 respirators to sell to those entities. *See id. ¶¶ 126-31*. Even if they did, the facts they have  
 16 admitted and pleaded would undermine any inference of an expectancy—after months of  
 17 ramping up production, 3M only manufactured 1.1 billion respirators on an annual basis in early  
 18 2020, and AIME’s alleged source purported to have *500 million* respirators available for sale.  
 19 *See Compl. ¶¶ 43-44; Ans. ¶¶ 43-44; Countercl. ¶ 60*. There is, therefore, no *plausible* inference  
 20 that the Defendants actually had a source for authentic 3M respirators.

21       Nor do the Defendants allege any facts from which the Court could infer that the  
 22 “negotiations” were of any substance at all. No reasonable person, considering the allegations  
 23 made in the counterclaims, could infer that Defendants had a valid business expectancy.

24       **B. Defendants have not pleaded that 3M knew of their alleged expectancy.**

25       One cannot plead the knowledge element of tortious interference with a conclusory  
 26 statement that the defendant had knowledge. *See Capitol W. Appraisals LLC v. Countrywide Fin.*

1      Corp., 467 Fed. Appx. 738, 740 (9th Cir. 2012) (mem. op.) (citing *Ashcroft v. Iqbal*, 556 U.S.  
 2      662, 129 S.Ct. 1937, 1951 (2009)). “The Ninth Circuit has found such conclusory allegations  
 3      insufficient.” *Lai v. USB-Implementers Forum, Inc.*, CV1405301RGKPJWX, 2015 WL  
 4      12746705, at \*8 (C.D. Cal. Mar. 11, 2015) (citing *Capitol W.* at 739).

5                Here, however, Defendants merely recite the knowledge element without alleging any  
 6      facts supporting an inference that 3M knew of their supposed “negotiations.” *See* Countercl. ¶  
 7      129. “These conclusory statements are not entitled to the presumption of truth, and are  
 8      insufficient to plead [3M]’s knowledge. *Capitol W. Appraisals* at 740; *accord Dynasty Mgmt.,*  
 9      *LLC v. UMG Recordings, Inc.*, 759 Fed. Appx. 784, 788 (11th Cir. 2018). The claim fails.

10                **C. Defendants have not adequately pleaded improper means.**

11                “Interference is for an improper purpose if it is wrongful by some measure beyond the  
 12      interference itself, such as a statute, regulation, recognized rule of common law, or an established  
 13      standard of trade or profession.” *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d  
 14      1169, 1189 (W.D. Wash. 2019) (quoting *Newton Ins. Agency & Brokerage, Inc. v. Caledonian*  
 15      *Ins. Grp., Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30, 34 (2002), as corrected (Sept. 23, 2002)).  
 16      When one alleges intentional interference by way of “making false statements to potential  
 17      customers,” the allegation must satisfy Rule 9(b)’s heightened pleading requirement.” *Int'l*  
 18      *Equip. Trading, Ltd. v. Illumina, Inc.*, 312 F. Supp. 3d 725, 734–35 (N.D. Ill. 2018); *accord*  
 19      *BioResource, Inc. v. U.S. PharmaCo Distribution, Ltd.*, C10-1053, 2010 WL 3853025, at \*3  
 20      (N.D. Cal. Sept. 29, 2010); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th  
 21      Cir. 2003) (insufficient averments of fraud in non-fraud claims should be disregarded, and the  
 22      claims evaluated as if those averments were not pleaded).

23                In the Ninth Circuit, “[a]verments of fraud must be accompanied by ‘the who, what,  
 24      when, where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106 (quoting *Cooper v.*  
 25      *Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). To satisfy this standard, plaintiffs must plead the  
 26      “specific content” of the alleged representation. *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th

1 Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.2004)). They  
 2 must also ““set forth what is false or misleading about [the] statement, and why it is false.”” *Vess*,  
 3 317 F.3d at 1106 (quoting *Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.)*, 42 F.3d  
 4 1541, 1548 (9th Cir.1994)).

5 Here, Defendants’ averment that 3M informed AIME’s “prospective customers” of 3M’s  
 6 “baseless allegations” does not satisfy Rule 9(b). Defendants offer no factual allegations about  
 7 what 3M said, to whom 3M said it, how 3M said it, or when 3M said it. If Defendants want to  
 8 accuse 3M of making fraudulent representations to AIME’s prospective “customers,” they must  
 9 comply with Rule 9(b).<sup>6</sup> Because they have not, the claim fails.

10 **D. Defendants have not pleaded damages.**

11 Pecuniary loss is a necessary element of a tortious interference claim under Washington  
 12 law. *Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn. App. 241, 250, 327 P.3d 1309, 1314 (2014). A  
 13 plaintiff must establish a reasonable certainty of monetary damages flowing from the lost  
 14 opportunity. *Greensun Grp., LLC v. City of Bellevue*, 7 Wn. App. 2d 754, 776, 436 P.3d 397, 409  
 15 (2019). Here, Defendants have pleaded no facts supporting an inference that they have suffered a  
 16 pecuniary loss, because they have alleged no facts supporting an inference that they could have  
 17 entered profitable contracts with any other party. There is no allegation that they had product to  
 18 sell, or that their cost for obtaining the product would have allowed them to make a profitable  
 19 sale to any of the named prospects. The claim therefore fails.

20 **VI. False Light and Defamation by Implication**

21 Defendants sixth and seventh counterclaims are for false light and defamation by  
 22 implication. “Defamation and invasion of privacy by false light are similar, yet distinct, causes of  
 23 action.” *Seaquist v. Caldier*, 8 Wn. App. 2d 556, 564, 438 P.3d 606, 611, review denied, 193  
 24 Wn.2d 1041, 449 P.3d 657 (2019). “The theoretical difference between the two torts is that a

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25  
 26 <sup>6</sup> Alternatively, if 3M’s representations to these “customers” were not fraudulent, then there is no allegation of  
 wrongful means and the claim fails.

1 defamation action is primarily concerned with compensating the injured party for damage to  
 2 reputation, while an invasion of privacy action is primarily concerned with compensating for  
 3 injured feelings or mental suffering.” *Id.* at 612 (quoting *Eastwood v. Cascade Broad. Co.*, 106  
 4 Wash.2d 466, 471, 722 P.2d 1295 (1986)). Only natural persons may assert false light claims.  
 5 *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 339, 364 P.3d 129, 139 (2015) (“Only a  
 6 living individual whose privacy has been invaded can maintain an action for invasion of  
 7 privacy.”). AIME, as a corporation with no privacy right, may not. *See id.*

8       A false light claim under Washington law requires a plaintiff to show (1) that the  
 9 “defendant publishe[d] statements that place a plaintiff in a false light”; (2) that “the false light  
 10 would be highly offensive”; and (3) that “the defendant knew of or recklessly disregarded the  
 11 falsity of the publication and the subsequent false light it would place the plaintiff in.” *Id.* at 612.

12       “*A prima facie defamation claim requires a plaintiff to prove falsity, an unprivileged  
 13 communication, fault, and damages.*” *Id.* Defamation by implication occurs when “otherwise true  
 14 statements create[] a false impression by omission of material facts . . . .” *Yeakey v. Hearst  
 15 Commc’ns, Inc.*, 156 Wn. App. 787, 792, 234 P.3d 332, 335 (2010) (quoting *Mohr*, 153 Wn.2d  
 16 812, 823, 108 P.3d 768, 774 (2005)). The plaintiff must show each element of defamation, but  
 17 may establish the falsity element by showing “that the communication left a false impression that  
 18 would be contradicted by the inclusion of omitted facts.” *Id.* at 827.

19       Defendants have not stated a claim for four reasons. First, they have failed to comply  
 20 with a condition precedent. Second, they complain of absolutely privileged communications.  
 21 Third, they have not established the “juxtaposition” of statements they rely on. Fourth,  
 22 Washington does not recognize defamation by implication claims based on juxtaposition.

23       **A.     *Defendants have not satisfied a condition precedent for these claims.***

24       Under Washington law, one may not state a claim for false light or defamation without  
 25 making “a timely and adequate request for correction or clarification from the defendant . . . .”  
 26 RCW 7.96.030-.040. A request is adequate only if it: “(a) Is made in writing and reasonably

1 identifies the person making the request; (b) Specifies with particularity the statement alleged to  
 2 be false and defamatory or otherwise actionable and, to the extent known, the time and place of  
 3 publication; (c) Alleges the defamatory meaning of the statement; [and] (d) Specifies the  
 4 circumstances giving rise to any defamatory meaning of the statement which arises from other  
 5 than the express language of the publication[.]” *Id.* at .040(b)(3).

6 Defendants’ counterclaim does not comply with this standard. Rather than specify any  
 7 particular statement and explain its falsity, Defendants gesture generally to 3M’s website and  
 8 assert that “[t]he defamatory meaning of the statements is self-evident . . . .” Countercl. ¶¶134-  
 9 137. Because Defendants have failed to comply with RCW 7.96.040 (despite citing it  
 10 themselves), a condition precedent to the claim is unmet. The Court should dismiss the claim.

11       **B.     3M’s statements in and about this litigation are absolutely privileged.**

12       Defendants complain that they are defamed and put in a false light when one “carefully  
 13 juxtaposes” two categories of statements by 3M: (1) 3M’s website’s statements about its  
 14 litigation efforts to combat COVID-related fraud and price-gouging (which Defendants do not  
 15 even allege mention Defendants at all), and (2) 3M’s allegations in this action. *See* Countercl. ¶¶  
 16 133-138, 148. The claim must fail because the statements are absolutely privileged.

17       “Allegedly libelous statements, spoken or written by a party or counsel in the course of a  
 18 judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or  
 19 relief sought . . . .” *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285, 1286 (1980); *see also*  
 20 Restatement (Second) of Torts § 652F, cmt. a (1977) (defamation privileges apply to privacy  
 21 torts). “The privilege applies to in-court statements and out-of-court statements that are pertinent  
 22 or material to the redress or relief sought.” *Allstate Ins. Co. v. Tacoma Therapy, Inc.*, 13-CV-  
 23 05214-RBL, 2014 WL 1494100, at \*4 (W.D. Wash. Apr. 16, 2014) (citing *Demopolis v. Peoples*  
 24 *Nat. Bank of Washington*, 59 Wn. App. 105, 109, 796 P.2d 426, 429 (1990)).

25       Here, Defendants do not allege that 3M has published any false statements about them  
 26 outside of the docket of this case. *See* Countercl. ¶¶ 132-152. Instead, Defendants claim rests on

1 a theory that one aware of both the Complaint and the website statements would understand that  
 2 3M has accused the Defendants of being fraudsters and price-gougers. This theory cannot stand  
 3 under Washington law; 3M's in-court statements are absolutely privileged so long as they are  
 4 pertinent to the relief sought. *McNeal*, 95 Wn.2d at 267. Here, 3M seeks to enjoin Defendants  
 5 from using 3M's name and marks, and alleges that Defendants have misused 3M's name and  
 6 marks in the past. Clearly, the allegations are pertinent to the sought-after relief.

7 3M's out-of-court statements "pertinent to" the proceedings are also privileged. *Tacoma*  
 8 *Therapy*, 2014 WL 1494100, at \*4. Even if Defendants alleged that 3M had mentioned them on  
 9 its website, the statements would be privileged.

10 Moreover, because Defendants' complaints about the website statements turn on the  
 11 allegations in the lawsuit, allowing Defendants to use the privileged litigation statements to  
 12 frame the website statements would vitiate the manifold public policies underlying the litigation  
 13 privilege. Even if the website communications were not privileged, it would be improper to  
 14 allow the Plaintiffs to use those statements to make an end-run around the litigation privilege.

15 **C. *Defamation-by-juxtaposition is not actionable in Washington.***

16 Privilege aside, Defendants' theory fails because Washington does *not* recognize  
 17 defamation by juxtaposition as Defendants have pleaded it. Defamation by implication occurs  
 18 when "otherwise true statements create[] a false impression by omission of material facts . . ."  
 19 *Yeakey*, 156 Wn. App. 792 (quoting *Mohr*, 153 Wn.2d 812, 823, 108 P.3d 768, 774 (2005)).

20 Here, however, Defendants complain not of any *omissions* in 3M's website statements;  
 21 but of the website statements' implication in light of the litigation statements. Countercl. ¶ 137.  
 22 Their theory, therefore, does not comport with Washington law, and fails.

23 **D. *Defendants have not established an actionable juxtaposition of statements.***

24 Even if Washington embraced a juxtaposition theory, it would not apply in this case.  
 25 Defendants' claim seems to rest on dicta from *Mohr*, in which the Washington Supreme Court  
 26 quoted Prosser and Keaton for the proposition that defamation-by-implication can occur when

1 “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them,  
2 or creates a defamatory implication by omitting facts.” *Mohr*, 153 Wn.2d at 823 (emphasis  
3 added) (quoting *Torts* at 117).<sup>7</sup> But Defendants do not actually allege that *3M* has juxtaposed the  
4 Complaint’s allegations with statements on its website. See Countercl. ¶¶ 133-135. Instead,  
5 Defendants allege that *third parties* have (and may) do so. See *id.* at ¶¶ 142-44.

6 This is not juxtaposition *by 3M* as required for defamation-by-implication. To  
7 “juxtapose” is to “plac[e] two or more things side by side or near one another.” Juxtaposition,  
8 Black’s Law Dictionary (11th ed. 2019). There is no allegation that *3M* has set side-by-side its  
9 Complaint in this action with the statements on its website. Defendants’ theory fails.

10 **CONCLUSION**

11 Defendants have not validly asserted even one counterclaim. The Court should dismiss  
12 the counterclaims.

13 Dated: November 20, 2020.

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24  
25  
26 <sup>7</sup> This dicta is not a statement of Washington law. *Yeakey*, 156 Wn. App. at 792.